

HANSON BRIDGETT LLP  
KURT A. FRANKLIN, SBN 172715  
kfranklin@hansonbridgett.com  
LISA M. POOLEY, SBN 168737  
lpooley@hansonbridgett.com  
SAMANTHA WOLFF, SBN 240280  
swolff@hansonbridgett.com

425 Market Street, 26th Floor  
San Francisco, California 94105  
Telephone: (415) 777-3200  
Facsimile: (415) 541-9366

HANSON BRIDGETT LLP  
TYSON M. SHOWER, SBN 190375  
tshower@hansonbridgett.com  
LANDON D. BAILEY, SBN 240236  
lbailey@hansonbridgett.com  
500 Capitol Mall, Suite 1500  
Sacramento, California 95814  
Telephone: (916) 442-3333  
Facsimile: (916) 442-2348

OTTEN LAW, PC  
VICTOR OTTEN, SBN 165800  
vic@ottenlawpc.com  
KAVITA TEKCHANDANI, SBN 234873  
kavita@ottenlawpc.com  
3620 Pacific Coast Highway, #100  
Torrance, California 90505  
Telephone: (310) 378-8533  
Facsimile: (310) 347-4225

Attorneys for Plaintiffs  
CORY SPENCER, DIANA MILENA  
REED, and COASTAL PROTECTION  
RANGERS, INC.

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

CORY SPENCER, an individual;  
DIANA MILENA REED, an  
individual; and COASTAL  
PROTECTION RANGERS, INC., a  
California non-profit public benefit  
corporation,

Plaintiffs.

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS CHARLIE AND  
FRANK FERRARA'S OBJECTIONS  
TO MAGISTRATE JUDGE OLIVER'S  
REPORT AND RECOMMENDATION**

1  
2 v.

3 LUNADA BAY BOYS; THE  
4 INDIVIDUAL MEMBERS OF THE  
5 LUNADA BAY BOYS, including but  
6 not limited to SANG LEE, BRANT  
7 BLAKEMAN, ALAN JOHNSTON  
8 AKA JALIAN JOHNSTON,  
9 MICHAEL RAE PAPAYANS,  
10 ANGELO FERRARA, FRANK  
11 FERRARA, CHARLIE FERRARA,  
and N. F.; CITY OF PALOS VERDES  
ESTATES; CHIEF OF POLICE JEFF  
KEPLEY, in his representative  
capacity; and DOES 1-10,

12 Defendants.  
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Complaint Filed: March 29, 2016  
Trial Date: December 12, 2017

1 **I. INTRODUCTION**

2 In their challenge to Judge Oliver's Report and Recommendation, the Ferrara  
3 Defendants do not dispute the Court's findings that they failed to take reasonable  
4 steps to preserve electronically stored information (ESI) that should have been  
5 preserved, that evidence was lost as a result, and that it cannot be restored or  
6 replaced through additional discovery. Nor do the Ferraras dispute Judge Oliver's  
7 finding that Plaintiffs have suffered and will continue to suffer prejudice from the  
8 loss of the electronic evidence.

9 Instead, the Ferraras argue this Court may not issue monetary sanctions to  
10 cure the undisputed prejudice. But neither the fact that they already paid some  
11 monetary sanctions for violating a Court Order, nor the fact that Plaintiffs did not  
12 specifically seek monetary sanctions through their Motion for Evidentiary  
13 Sanctions, divests the Court of its broad discretion in selecting an appropriate  
14 sanction to remedy Plaintiffs' prejudice. Moreover, Defendants' assertion that they  
15 have been deprived of notice and an opportunity to be heard with respect to the  
16 appropriate sanction is belied by the hearing transcript on this motion, as well as the  
17 Report and Recommendation. Because this Court is authorized to award additional  
18 monetary sanctions for prejudice caused by the Ferraras' spoliation of evidence, the  
19 Report and Recommendation should be adopted in full.

20 **II. RELEVANT PROCEDURAL HISTORY**

21 In November 2016, Plaintiffs served Defendants Charlie and Frank Ferrara  
22 with document requests. (Pltfs.' Mem. P. & A. Supp. Mot. for Monetary Sanctions  
23 (Pltfs.' Monetary Motion), Dock. No. 403-1 at 3.) After receiving inadequate and  
24 untruthful responses, Plaintiffs engaged in an extensive meet-and-confer effort  
25 lasting over seven months. (*Id.* at 3-4.) Ultimately, on July 13, 2017, the Court  
26 ordered the Ferraras to produce documents. (Dock. No. 267.) The Ferraras failed to  
27 comply with the July 13, 2017 Order, however, forcing Plaintiffs, on August 14,  
28 2017, to file a motion for monetary sanctions. (Dock. No. 403.) On August 22,

1 2017, Plaintiffs also filed a motion for evidentiary sanctions against the Ferraras and  
 2 Sang Lee, setting the matter to be heard before Judge Otero. (Dock. No. 425.)

3 On August 23, 2017, Judge Oliver granted Plaintiffs' monetary sanctions  
 4 motion with respect to Defendants' failure to comply with the Court's July 13, 2017  
 5 Order. (Dock. No. 432.) Judge Oliver directed Plaintiffs to submit a declaration  
 6 detailing their expenses incurred as a result of the Ferrara Defendants' failure to  
 7 comply with the Court's July 13, 2017 Order. (*Id.*)

8 Plaintiffs and the Ferraras then resolved the amount of monetary sanctions to  
 9 be paid and, on September 5, 2017, Plaintiffs filed the Declaration of Samantha  
 10 Wolff describing the resolution. (Dock. No. 444.) Per the agreement, counsel for  
 11 the Ferraras paid Plaintiffs' counsel \$32,137.50. Plaintiffs advised the Court that  
 12 they "no longer seek the Court's assistance in determining the amount to be awarded  
 13 for Defendants' failure to comply with this Court's July 13, 2017 Order" and stated  
 14 they would "not seek any further monetary sanctions from the Court for the alleged  
 15 spoliation of evidence raised in Plaintiffs' Monetary Sanctions Motion." (*Id.* at ¶ 5.)

16 On August 28, 2017, Judge Otero referred Plaintiffs' evidentiary sanctions  
 17 motion (Dock. No. 425) and other pending matters to Judge Oliver for a Report and  
 18 Recommendation. (Dock. No. 435.) On September 19, 2017, Judge Oliver issued  
 19 an Order setting a briefing and hearing schedule. (Dock. No. 461.)

20 On October 12, 2017, after the matter was fully briefed, Judge Oliver held a  
 21 hearing. (*See* Dock. Nos. 468, 472, 473, 477, 478, 489.) At the hearing, Judge  
 22 Oliver asked counsel for the Ferraras, Alison Hurley, what would be an appropriate  
 23 sanction if the Court did not find intent to deprive Plaintiffs of electronic evidence,  
 24 but found that Defendants' actions prejudiced Plaintiffs. (Wolff Decl., Ex. 1 at  
 25 70:2-9.) Ms. Hurley responded that a monetary sanction could be sufficient, but  
 26 because Defendants already paid a monetary sanction, the sanction should be  
 27 permitting Plaintiffs to argue Defendants' evidence spoliation at trial. (*Id.* at 70:10 -  
 28 71:5.) Judge Oliver then observed that the prior sanctions order was directed at

1 “compensating [Plaintiffs] for costs incurred and associated with having to bring  
 2 [the Ferrara Defendants] in to compliance with the Court’s order” and that spoliation  
 3 was a different issue. (*Id.* at 70:18-71:12.) Judge Oliver also noted that Plaintiffs  
 4 already would be entitled to argue evidence spoliation at trial. (*Id.*) Ultimately, Ms.  
 5 Hurley argued that the sanction for her clients’ violation of Rule 37(e)(1) should be  
 6 “no sanction” or the denial of their summary judgment motions. (*Id.* at 72:17-20.)

7 On October 20, 2017, Judge Oliver issued her Report and Recommendation,  
 8 concluding as follows:

9 (1) both Ferrara Defendants failed to take reasonable steps  
 10 to preserve ESI, which should have been preserved in the  
 11 anticipation or conduct of litigation, and the ESI was lost  
 12 as a result and cannot be restored or replaced through  
 additional discovery;

13 (2) without additional evidence of intent (which Plaintiffs  
 14 had not been able to obtain due to Defendants’ conduct),  
 severe sanctions under Rule 37(e)(2) were not warranted<sup>1</sup>;

15 (3) Plaintiffs have suffered prejudice in having to oppose  
 16 summary judgment motions without this potentially  
 relevant evidence;

17 (4) Plaintiffs will be prejudiced at trial by not being able to  
 18 present or rely on the contents of the missing text  
 19 messages and by being without any records of phone calls  
 20 or text messages exchanged during a “highly relevant  
 21 period of time surrounding the alleged incidents of  
 harassment of the named Plaintiffs.”

22 (Dock No. 496, pp. 25-28.)

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23  
 24 <sup>1</sup> Because Charlie and Frank Ferrara were deposed before Plaintiffs learned of their  
 25 unrecoverable text messages, the Court determined that “[i]t would be unfair to  
 26 expect Plaintiffs to have been able to fully probe spoliation and the intent behind the  
 27 destruction or failure to preserve evidence when Plaintiffs were unaware that any  
 28 evidence previously in possession or under control of the Ferrara Defendants was  
 unrecoverable.” (*Id.* at p. 27:6-10.)

1 To cure Plaintiffs' prejudice caused by the Ferraras' spoliation, Judge Oliver  
 2 recommended they pay monetary sanctions and Plaintiffs' expenses associated with  
 3 deposing Frank and Charlie Ferrara a second time, which will allow Plaintiffs "to  
 4 fully explore the spoliation issues and the level of culpability or intent behind the  
 5 failure to preserve text messages and cellular phone bill records." (*Id.* at 30.) Judge  
 6 Oliver also recommended further submissions by the parties to determine the  
 7 amount of monetary sanctions, including Plaintiffs' costs and fees to re-depose  
 8 Frank and Charlie Ferrara. (*Id.* at pp. 30-31.) Judge Oliver also recommended that,  
 9 after further depositions, Plaintiffs "be permitted to submit evidence concerning  
 10 what evidence was destroyed, when the Ferrara Defendants had notice of the  
 11 litigation, and the Ferrara Defendants' intent with regard to the destruction of  
 12 evidence." (*Id.* at p. 31.)

### 13 **III. ARGUMENT**

#### 14 **A. The Court Has Broad Discretion To Award Sanctions.**

15 Where prejudice results from a party's spoliation of ESI, a Court "may order  
 16 measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1).  
 17 A sanctions award "can range from minor sanctions, such as the awarding of  
 18 attorneys' fees, to more serious sanctions, such as dismissal of claims or instructing  
 19 the jury that it may draw an adverse inference." *Blumenthal Distr., Inc. v. Herman*  
 20 *Miller, Inc.*, 2016 WL 6609208, \*2 (C.D. Cal. July 12, 2016) (quoting *Apple Inc. v.*  
 21 *Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1135 (N.D. Cal. 2012)).  
 22 Further, "[a]ny sanction must be the least drastic available to adequately mitigate  
 23 the prejudice suffered." *Id.* (quoting *Apple Inc.*, 881 F. Supp. 2d at 1150).

24 Here, based upon the Court's determination that the Ferraras violated Rule  
 25 37(e)(1) and prejudiced Plaintiffs, Judge Oliver appropriately recommended a  
 26 sanction designed to mitigate the prejudice. Because more information is needed to  
 27 infer Defendants' intent (given that Plaintiffs were not made aware of the Ferrara's  
 28 spoliation until after both Defendants were deposed), Judge Oliver recommended

1 that Plaintiffs have the opportunity to conduct further depositions of Defendants.  
 2 (Dock. No. 496, p. 30.) Judge Oliver also recommended that the expenses  
 3 associated with these depositions be borne by the Ferraras as a sanction. (*Id.*)

4 As another consequence of the Ferraras' conduct, Judge Oliver recommended  
 5 additional monetary sanctions "in order to cure, in part, the prejudice to Plaintiffs  
 6 from the spoliation." (*Id.*) Judge Oliver observed that the parties' prior agreement  
 7 with respect to fees did not preclude this award. (*Id.*)

8 The fact that Plaintiffs did not specifically request reimbursement for fees  
 9 incurred since resolution of their monetary sanctions motion is irrelevant. Plaintiffs  
 10 sought relief for spoliation and "the court's discretion regarding the form of a  
 11 spoliation sanction is broad." *Blumenthal Distr.*, 2016 WL 6609208 at \*22.  
 12 Moreover, the Ferraras were notified and provided an opportunity to specifically  
 13 address the monetary sanctions as a "lesser remedy." (Wolff Decl., Ex. 1 at 70-72.)  
 14 Further, the Report and Recommendation, if adopted by this Court, anticipates  
 15 "further submissions by the Parties" regarding the amount of the award. (Dock. No.  
 16 496, 30-31.) Thus, the Report and Recommendation should be adopted in full.

#### 17 **IV. CONCLUSION**

18 Having determined that Plaintiffs have been and will continue to be  
 19 prejudiced by the Ferraras' spoliation of evidence, Judge Oliver properly considered  
 20 and awarded "measures no greater than necessary to cure the prejudice." Fed. R.  
 21 Civ. P. 37(e)(1). Plaintiffs never agreed to limit the Court's authority in this regard  
 22 (nor could they). Accordingly, the Ferraras' objections should be overruled, and the  
 23 Report and Recommendation should be adopted in full.

24 DATED: November 14, 2017

HANSON BRIDGETT LLP

26 Bv: /s/ Samantha Wolff  
 27 SAMANTHA D. WOLFF  
 Attorneys for Plaintiffs